Enesty Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-270 OF 1996

MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ JJCA

12 MAY 2003

Revenue Law — *Income tax — Assessment — Mandamus to direct respondent to issue and serve on appellant notices of assessment for years of assessment 1982, 1983 and 1984 — Assessment not made for 1982, 1983 and 1984 as appellant had no chargeable income — Whether assessment had to be made only if there was chargeable income to levy tax upon — Whether s 90(1) of Income Tax Act 1967 made it mandatory for assessment to be made in every case where a return under s 77 was delivered to respondent*

Revenue Law — *Income tax — Assessment — Prescribed assessment forms not completed for 1982, 1983 and 1984 — Whether work or calculation done before date specified in assessment form constituted making of assessment — Whether any other determination as to chargeable income made in some other medium or for some purpose other than for completion of the assessment form constituted making of assessment — Income Tax Act 1967 s 93*

Under s 42 of the Income Tax Act 1967 ('the Act'), the statutory income of a person from a source consisted of the amount of his adjusted income from that source plus the amount of certain charges falling to be made in relation to that source and then reduced by the amount of certain allowances falling to be made in relation to that source. One of the allowances stipulated in para 15 of Schedule 3 to the Act was allowance for certain plant expenditure. This allowance was a proportion of the expenditure. The Income Tax (Qualifying Plant Annual Allowances) Rules 1982 ('the 1982 Rules') prescribed the proportion of the expenditure. Under r 2 of the 1982 Rules, a rate specially formulated therein shall apply to the qualifying plant expenditure of a person for the period commencing on 1 January 1981 to 3 December 1985, '... unless he elects in writing, when claiming an annual allowance for that year in respect of that expenditure, that the allowance be equal to the rates prescribed in the Income Tax (Qualifying Plant Annual Allowances) Rules 1968 ('the 1968 rates')'. In the returns furnished by the appellant to the respondent under s 77 of the Act for the years of assessment 1982, 1983 and 1984, the appellant did not make that election, although presumably it did claim the annual allowances. Consequently, the rate formulated in r 2 of the 1982 Rules applied. According to the respondent, no assessment was made for those years because the appellant had no chargeable income. A couple of years later, the appellant, through its tax agents, commenced efforts to have the 1968 rates applied for those years. The respondent refused to apply the 1968 rates. Being dissatisfied with the respondent's decision in the matter of the rates for the annual allowances, the appellant wanted to appeal to the Special Commissioner but under s 99(1) of the Act, an appeal to the Special

Commissioner could only lie against an assessment. So on 9 August 1988 the appellant's tax agents requested the respondent to issue notices of assessment under s 96(1) of the Act for 1982, 1983 and 1984. The respondent replied that he could not issue notices of assessment because the appellant had no chargeable income to assess income tax on, but that he would produce tax computations for those years. The computations were furnished in a letter dated 1 December 1988 and they showed nil chargeable income for the years 1982, 1983 and 1984. This was an appeal by the appellant arising from the High Court's refusal to grant an order of mandamus to direct the respondent to issue and serve on the appellant notices of assessment for years of assessment 1982, 1983 and 1984.

Held, dismissing the appeal:

(1) The issue to be determined here was whether the appellant was right in contending that the respondent had made assessments for 1982, 1983 and 1984. If the respondent was correct, then the respondent was bound by s 96(1) of the Act to cause notices of assessment to be served on the appellant and mandamus would lie to compel the respondent to discharge his duty. On the other hand, if the respondent was incorrect, there was no case for demanding service of notices of assessment (see p 103E–F).

(2) The respondent had to determine, either from the information given in the return or by using the respondent's own judgment, whether the person concerned had a chargeable income and what the amount was, and then make an assessment of the tax payable. The implication therefore was that, an assessment had to be made only if there was chargeable income to levy tax upon. As such, s 90(1) of the Act did not make it mandatory for an assessment to be made in every case where a return under s 77 of the Act was delivered to the respondent (see p 104A, C–D).

(3) According to s 93 of the Act, there was formality, ritual and deliberateness in making an assessment. The prescribed form must be used. The date on which the form was duly completed must be specified in the appropriate space in the form and this was the date on which the assessment was presumed to have been made. Any other determination as to chargeable income or tax liability made in some other medium, or for some purpose other than for completion of the assessment form, or made before that date, was not the making of an assessment. Even if the form was completed, no assessment would have been made until the date was specified. Any work, inquiry or calculation done before that would not be the making of the assessment but an effort made towards the making of the assessment, which was the completion of the form coupled with the dating of it, and the assessment that was made comprised the matters indicated in the form as stated in s 93(b) of the Act (see p 107B–D).

(4) In view of s 93 of the Act and the fact that no question arose before the Court of Appeal that assessment forms had been completed for the three years of assessment in question, no assessments had been made in respect of those years and therefore the respondent was under no duty under s 96(1) of the Act to have notices of assessment served on the appellant (see p 107E–F).

[Bahasa Malaysia summary

Di bawah s 42 Akta Cukai Pendapatan 1967 ('Akta tersebut'), pendapatan statutori seseorang dari satu sumber mengandungi jumlah pendapatan beliau yang telah dilaraskan oleh sumber tersebut dan juga jumlah caj-caj tertentu yang akan dibuat berkaitan dengan sumber tersebut dan kemudian akan dikurangkan dengan jumlah elaun-elaun tertentu yang akan dibuat berkaitan dengan sumber tersebut. Salah satu daripada elaun yang ditetapkan dalam perenggan 15 dalam Jadual 3 kepada Akta tersebut adalah elaun untuk perbelanjaan projek tertentu. Elaun ini adalah perkadaran perbelanjaan tersebut. Kaedah-Kaedah Cukai Pendapatan (Qualifying Plant Annual Allowances) 1982 ('Kaedah-Kaedah 1982') menetapkan perkadaran perbelanjaan tersebut. Di bawah k 2 Kaedah-Kaedah 1982, satu kadar yang dirumus khas hendaklah terpakai kepada perbelanjaan 'qualifying plant' seseorang untuk tempoh yang bermula pada 1 Januari 1981 hingga 3 Disember 1985, '... unless he elects in writing, when claiming an annual allowance for that year in respect of that expenditure, that the allowance be equal to the rates prescribed in the Income Tax (Qualifying Plant Annual Allowances) Rules 1968 ('the 1968 rates')'. Dalam penyata-penyata yang dikemukakan oleh perayu kepada responden di bawah s 77 Akta tersebut untuk tahun-tahun taksiran 1982, 1983 dan 1984, perayu tidak membuat pilihan tersebut, walaupun ia dianggap telah menuntut elaun-elaun tahunan. Berikutan itu, kadar yang dirumuskan dalam k 2 1982 adalah terpakai. Menurut responden, tiada taksiran telah dibuat untuk tahun-tahun tersebut kerana perayu tidak mempunyai pendapatan bercukai. Beberapa tahun kemudian, perayu, melalui ejen-ejen cukainya, telah memulakan usaha untuk mendapatkan kadar 1968 agar digunakan untuk tahun-tahun tersebut. Responden enggan untuk menggunakan kadar 1968 tersebut. Berasa tidak puas hati dengan keputusan responden berhubung perkara mengenai kadar-kadar untuk elaun-elaun tahunan, perayu ingin membuat rayuan kepada Pesuruhjaya Khas di bawah s 99(1) Akta tersebut, satu rayuan kepada Pesuruhjaya Khashanay boleh dibuat berdasarkan satu taksiran. Oleh itu pada 9 Ogos 1988, ejen-ejen cukai perayu telah meminta responden untuk mengeluarkan notis-notis taksiran di bawah s 96(1) Akta tersebut untuk tahun-tahun 1982, 1983 dan 1984. Responden menjawab bahawa beliau tidak boleh mengeluarkan notis-notis taksiran tersebut kerana perayu tidak mempunyai pendapatan bercukai untuk

membuat taksiran cukai pendapatan, tetapi beliau akan mengemukakan satu pengiraan cukai untuk tahun-tahun tersebut. Pengiraan-pengiraan tersebut telah dikemukakan dalam sepucuk surat bertarikh 1 Disember 1988 dan menunjukkan tiada pendapatan bercukai untuk tahun-tahun 1982, 1983 dan 1984. Ini adalah rayuan oleh perayu yang timbul dari keengganan Mahkamah Tinggi untuk membenarkan satu perintah mandamus untuk mengarahkan responden mengeluar dan menyampaikan ke atas perayu notis-notis taksiran untuk tahun-tahun taksiran 1982, 1983 dan 1984.

Diputuskan, menolak rayuan tersebut:

(1) Persoalan yang perlu ditentukan di sini adalah sama ada perayu betul dalam menghujahkan bahawa responden telah membuat taksiran-taksiran untuk tahun-tahun 1982, 1983 dan 1984. Sekiranya responden betul, maka responden terikat oleh s 96(1) Akta tersebut untuk menyebabkan notis-notis taksiran disampaikan ke atas perayu dan mandamus yang akan memaksa responden untuk melepaskan tanggungjawabnya. Sebaliknya, jika responden tidak betul, tiada kes untuk menuntut penyampaian notis-notis taksiran tersebut (lihat ms 103E–F).

(2) Responden perlu menentukan, sama ada dari maklumat yang diberikan atau dengan menggunakan pertimbangan responden sendiri, sama ada orang yang berkenaan mempunyai pendapatan bercukai dan untuk jumlah berapa, dan kemudian membuat satu taksiran cukai yang perlu dibayar. Implikasinya adalah, satu taksiran perlu dibuat hanya jika mempunyai pendapatan bercukai untuk dikenakan cukai ke atasnya. Oleh demikian, s 90(1) Akta tersebut tidak menjadikan ia mandatori untuk satu taksiran dibuat dalam setiap kes di mana satu penyata di bawah s 77 Akta tersebut akan dihantarkan kepada responden (lihat ms 104A, C-D).

(3) Menurut s 93 Akta tersebut, tiada formaliti, ritual dan sikap perlahan dalam membuat taksiran tersebut. Borang yang ditetapkan hendaklah digunakan. Tarikh di mana borang tersebut wajar disiapkan hendaklah ditetapkan dalam ruang kosong yang sesuai dalam borang tersebut dan inilah tarikh taksiran tersebut dianggap telah dibuat. Apa-apa penentuan lain berhubung pendapatan bercukai atau medium yang lain, atau untuk tujuan selain dari melengkapkan borang taksiran, atau dibuat sebelum tarikh tersebut, tidak dianggap sebagai membuat satu taksiran. Walaupun jika borang tersebut tidak lengkap, tiada taksiran boleh dibuat sehingga tarikh yang ditetapkan. Apa-apa kerja, pertanyaan atau pengiraan yang dibuat sebelum itu tidak dianggap sebagai membuat taksiran tetapi satu usaha yang dibuat dalam membuat satu taksiran, iaitu melengkapkan borang tersebut dan meletakkan tarikh di atasnya, dan taksiran yang dibuat merangkumi perkara-perkara yang ditunjukkan dalam

borang tersebut sebagaimana yang dinyatakan dalam s 93(b) Akta tersebut (lihat ms 107B–D).

(4) Berhubung s 93 Akta tersebut dan hakikat bahawa tiada persoalan timbul di hadapan Mahkamah Rayuan bahawa borang-borang taksiran telah dilengkapkan untuk tiga tahun penaksiran yang dipersoalkan, tiada taksiran telah dibuat berhubung tahun-tahun tersebut dan oleh itu responden tidak mempunyai tanggungjawab di bawah s 96(1) Akta tersebut untuk menyampaikan notis-notis taksiran tersebut ke atas perayu (lihat ms107E–F).]

Notes

For cases on assessment of income tax, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1940–1958.

Cases referred to

King v The Deputy Federal Commissioner of Taxation for South Australia, The; ex parte Hooper [1926] 37 CLR 368 (refd)

Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue [1991] STC 474 (refd)

Legislation referred to

Income Tax (Qualifying Plant Annual Allowances) Rules 1968
Income Tax (Qualifying Plant Annual Allowances) Rules 1982 r 2
Income Tax Act 1976 [New Zealand] ss 19, 25
Income Tax Act 1967 ss 42, 77, 90(1), 93, 96(1), 99(1), Sch 3, paras 15, 16,
Income Tax Assessment Act 1922–1924 [Aust] s 35
Land and Income Tax Act 1954 [New Zealand] ss 17, 24(1)

Appeal from: Originating Motion No R8–25–64 of 1990 (High Court, Kuala Lumpur)

KI Goh (*Shearn Delamore & Co*) for the appellants.

Raja Kamarulzaman bin Raja Musa (*Zaleha bte Adam* with him) (Legal Officers, Inland Revenue Board) for the respondent.

Abdul Aziz JCA (delivering judgment of the court): This was an appeal from the High Court's refusal of an order of mandamus to direct the respondent to issue and serve on the appellant company notices of assessment for years of assessment 1982, 1983 and 1984.

According, to s 42 of the Income Tax Act 1967, the statutory income of a person from a source consists of the amount of his adjusted income from that source plus the amount of certain charges falling to be made in relation to that source and then reduced by the amount of certain allowances falling to be made in relation to that source. One of the allowances is set out in para 15 of Sch 3 to the Act. It is an allowance for certain plant expenditure. It is known as an annual allowance (para 14, Sch 3). The allowance is a proportion of the expenditure. The proportion is

prescribed by rules. The first rules were the Income Tax (Qualifying Plant Annual Allowances) Rules 1968 (PU 154/68) ('the 1968 Rules'), now revoked by the 2000 Rules (PU(A) 52/2000). The proportions, or rates as they were termed there, were set out in the Schedule to the 1968 Rules. The schedule was completely substituted by an amendment in 1980 (PU(A) 346/1980), the new schedule becoming the schedule to the 1968 Rules. In 1982 came the Income Tax (Qualifying Plant Annual Allowances) Rules 1982 (PU(A) 74/1982) which were to have effect in respect of qualifying plant expenditure incurred from 1 January 1981 to 3 December 1985. The effect of r 2 was to apply to the qualifying plant expenditure of a person for that period, for the purpose of determining the annual allowances, a rate specially formulated in that rule (which rate we need not set out), 'unless he elects in writing, when claiming an annual allowance for that year in respect of that expenditure, that the allowance be equal to the rates prescribed in the [1968 Rules]'.

In the returns that the appellants furnished the respondent under s 77 of the Act for the years of assessment 1982, 1983 and 1984, the appellants did not make that election, although presumably they did claim the annual allowances. So the consequence was that the rate specially formulated in r 2 of the 1982 Rules would be applied.

According to the respondent, no assessment was made for those years because the appellants had no chargeable income.

A couple of years later, the appellants through their tax agents, commenced efforts to have the 1968 rates applied for those years. The efforts apparently started with a letter of the appellants' tax agents dated 27 January 1987. The respondent refused to apply the rates of the 1968 Rules.

Being dissatisfied with the respondent's decision in the matter of the rates for the annual allowances, the appellants wished to appeal to the Special Commissioner but they found that according to s 99(1) of the Act an appeal to the Special Commissioner could only lie against, and therefore required, an assessment. So on 9 August 1988 the appellants' tax agents requested the respondent to issue notices of assessment under s 96(1) for those years. (According, to that section, the respondent is required to serve a notice of assessment on the person concerned as soon as assessment has been made). The respondent replied on 28 September 1988 that he could not issue notices of assessment because the appellants had no chargeable income to assess income tax on, but he would produce tax computations for those years. These were furnished in a letter dated 1 December 1988. They showed nil chargeable income for 1983 and 1984 and did not show any chargeable income for 1982.

According to the statement under O 53 r 3(2) of the Rules of the High Court 1980 that went in support of the appellants' application for leave to apply for mandamus, it was not the appellants' case that the respondent had not made assessments for the years 1982, 1983 and 1984. The appellants' case, as was evident to us from sub-para (i) of para 3 of the statement, was that assessments had been made for those years, and since they had been made the respondent was bound by s 96(1) to cause notices of assessment

to be served on them. Hence the appellants' prayer was for an order that notices of assessment for those years be issued and served and not also for an order that assessments be made. Now as to what grounds the appellants had for contending that assessments had been made and bringing their application on that footing, this we could see from sub-paras (g) and (h) of para 3 of the statement. They were deductive paragraphs where the premise was the fact that the respondent had, as stated in his aforesaid letter dated 28 September 1988, found that the appellants had no chargeable income and had prepared the tax computations that were given in his letter dated 1 December 1988. From that premise the appellants made the inference that the respondent must have made assessments. The inference that the respondent must have made assessments was, in sub-para (i) of para 3, upgraded or equated to the insistence that assessments had been made.

In his grounds of decision, the learned judge, at p 5, said: 'The issue therefore, is whether the respondent had failed in its duty in the circumstances to make an assessment and to issue such notices of assessment to the applicant'. That statement we thought was not correct as regards failure in duty to make assessments. Since according to the appellants' statement their case was that the respondent had made assessments and therefore must, as required by s 96(1) of the Act, issue notices of assessment, there could not have been an issue whether the respondent had failed to make assessments. An issue that the respondent had failed in his duty to make assessments could only have sprung from the appellants, and no such issue could have so sprung as the appellants themselves insisted that assessments had been made. The issue was rather whether the appellants were right in contending that the respondent had made assessments. If they were, then the respondent was bound by s 96(1) of the Act to cause notices of assessment to be served on the appellants and mandamus would lie to compel the respondent to discharge his duty. If not, there was no case for demanding service of notices of assessment.

Although in sub-para (f) of para 3 of the statement it was contended that s 90(l) of the Act required the respondent to make an assessment in any event where a person has delivered the return required by s 77 of the Act, it was not, as we have said, the appellants' case that the respondent had not made assessments. That contention was made by way of support for the contention that assessments had been made. In other words, it was as though the case of the appellants was that because of the factual premise that we have stated and also because s 90(1) of the Act required that in any event assessments be made, assessments must have been, and were in fact, made.

Section 90(1) of the Act is as follows:

> (1) Where a person has delivered a return under s 77 to the Director General for a year of assessment, the Director General may:
>
> (a) accept the return and make an assessment accordingly, or
>
> (b) refuse to accept the return and, according to the best of his judgment, determine the amount of the chargeable income of that person for that year and make an assessment accordingly.

As to whether s 90(1) of the Act imposes a duty on the respondent to make an assessment in every case of a person who has delivered a return under s 77 of the Act, the learned judge was of the view that s 90(1) of the Act does not do so and that since an assessment is not to determine chargeable income but to determine the tax payable on the chargeable income, and since the precondition for making an assessment is the determination of the amount of chargeable income, then if there is no chargeable income, there can be no tax and no assessment is required.

Whether s 90(1) makes it mandatory that an assessment be made in the case of each person who has delivered a return under s 77 is a matter of construction of the section. It was not difficult to see the appellants concluding from the alternative courses provided by paras (a) and (b), each of which courses ends with the making of an assessment, that there is no choice for the respondent but to make an assessment. We were inclined to view the alternative courses as emphasizing that the respondent has in every case to determine, either from the information given in the return or by using the respondent's own judgment, whether the person concerned has a chargeable income and what is its amount, and then to make an assessment of the tax payable, the implication being that an assessment has to be made only if there is chargeable income to levy tax upon. To us the language of the section is not so clear as to deny admission to the perfectly reasonable implication that an assessment is not required if there is no chargeable income.

Having disposed of the effect of s 90(1), we revert to what, going by the statement, was virtually the only issue in this case, that is whether assessments had been made for the years of assessment 1982, 1983 and 1984. The appellants maintained that assessments had been made and they concluded that from the factual premise stated earlier. To repeat, their stand was that for the respondent to state in their letter of 28 September 1988 that the appellants had no chargeable income and to provide on 1 December 1988 the tax computations showing no chargeable income, the respondent had to make, and did make, assessments. That stand could only have been taken on the proposition that any work or exercise done by the respondent by which he is enabled to know whether or not a person has a chargeable income is the making of an assessment. The question for us to decide, therefore, was whether such a proposition was right.

The appellants relied mainly on two authorities. One of them was *The King v The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper* [1926] 37 CLR 368, a decision of the High Court of Australia. The statute concerned was the Income Tax Assessment Act 1922–1924, s 35 of which placed a statutory duty on the commissioner to 'make assessments': p 374. The case was cited for the following dictum of Isaacs J at pp 372 and 373 on the nature of an assessment:

> Before indicating in detail the successive provisions of the Act, one general deduction from those provisions may be stated, a deduction possibly obvious, but very necessary to remember. It is as to the nature of an assessment. An 'assessment' is not a piece of paper: it is an official act or operation; it is the commissioner's ascertainment, on consideration of all relevant circumstances,

> including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment.' And then, says the Act (s 54), 'income tax shall be due and payable sixty days after the service by post of a notice of assessment.' The section adds that, where by amendment of an assessment additional income tax is thereby payable by a taxpayer, it is due and payable thirty days after notice of amended assessment. But neither the paper sent nor the notification it gives is the 'assessment.' That is and remains the act or operation of the commissioner.

The first thing we would, with respect, say about the definition of 'assessment' in the passage is that the definition will have a problem of fitting, into the idea of making an assessment. As has been stated, the commissioner had a statutory duty to make assessments. There would come a time when, in respect of a taxpayer, he would be able to say that he had made an assessment. He then, if asked, would have to show what he had made, that is the assessment. Surely he could not point to the efforts that he had made and the operation that he had executed as the- assessment that he had made. The natural thing to do would be to show the result of the work, which would have to be on paper.

The second thing we would say about the passage is that it does not help to answer the question that we saw as being posed in this case. The passage is concerned to emphasize that an assessment is the work undertaken to ascertain the amount of tax chargeable and not the paper on which the ascertainment is recorded, whereas the question that we saw as being posed in this case was a wider one.

The other authority relied on by the appellants was *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue* [1991] STC 474, a Privy Council decision. It involved the construction of certain sections of the New Zealand Land and Income Tax Act 1954 ('the 1954 Act') which was consolidated in the Income Tax Act 1976 ('the 1976 Act'). Section 19 of the 1976 Act (s 17 of the 1954 Act) imposed a duty on the commissioner, from the returns and other information, to 'make assessments in respect of every taxpayer of the amount on which tax is payable and of the amount of that tax'. Section 25 of the 1976 Act (s 24 of the 1954 Act) provided as follows in sub-s (1):

> (1) When any person has made returns and has been assessed for income tax for any year, it shall not be lawful for the commissioner to alter the assessment so as to increase the amount thereof after the expiration of four years from the end of the year in which the assessment was made.

The circumstances giving, rise to the appeal were, as related at p 475, as follows:

> The appellants, Lloyds Bank Export Finance Ltd (the taxpayers), submitted the necessary returns for the years 1976 and 1977 showing small profits. However, because of substantial losses in prior years which they were entitled to carry forward and set off, the respondent (the commissioner) made determinations to the effect that no tax was payable by them in the two years in question. Some five years after the last of the two determinations the commissioner sought to assess the taxpayers to tax in respect of the above two

> years. The taxpayers challenged the assessments on the ground, inter alia, that they were statute-barred by reason of the provisions of s 24 of the 1954 Act. Tompkins J upheld the taxpayers' objection to the assessments (see (1988) II TRNZ 733) but the Court of Appeal quashed the orders made in the High Court and declared that the commissioner was not barred by s 25 of the 1976 Act (the re-enactment of s 24 of the 1954 Act) from making the assessments (see [1990] 2 NZLR 154).

A

B

As stated at p 477a–b:

> The issue between the parties is whether the determination, to use a neutral word, by the commissioner for the years 1976 and 1977 that no tax was payable by the taxpayers constituted assessments for the purposes of s 25(l). If they did, the commissioner accepts that the later assessments were out of time and therefore ineffective. If they did not, the later assessments were not time-barred.

C

The privy council gave an answer in the affirmative. They approved the following passage at p 479 g–j from the judgment of Tompkins J:

D

> In my opinion the expression 'make assessments' in the context of s 17, means the process by which the commissioner carries out his statutory obligation to ascertain the amount on which tax is payable and the amount of tax. I find nothing in the section, nor in the statutory scheme to justify a conclusion that the commissioner only makes an assessment where he determines that there is tax payable. A conclusion that there is no amount on which tax is payable and that as a consequence there is no tax payable involves making an assessment from the returns and other information in his possession just as much as if the result of the assessment were to find that there was an amount on which tax was payable and consequently there was tax payable.

E

In the present case, notices of assessment were not issued for the three years of assessment in question because there was no chargeable income. To decide not to issue the notices of assessment, the respondent would have concluded that there was no amount on which tax was payable and that as a consequence there was no tax payable. Applying Tompkins J's definition, the respondent had made assessments. This was what the learned judge in the instant case had to say about it:

F

G

> If the consideration is to be placed on the interpretation of our s 90(1) alone on the authority of *Lloyds Bank Export Finance Ltd*, it would appear that the applicant has made out its case against the respondent to met this court to issue mandamus against the respondent to compel it to issue to and caused [sic] to be served on the applicant notices of assessment for the years of assessment 1982, 1983 and 1984.

H

But the learned judge went on to say that in *Lloyd's Bank Export Finance Ltd*, no mention was made of the equivalent of our s 93 of the Act, and he concluded, on the basis of s 93 of the Act, that the respondent had not made assessments for the three relevant years.

Section 93 of the Act provides as follows:

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> An assessment in respect of a person shall:
>
> (a) be made in the appropriate prescribed form;

A (b) indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable income and the tax charged thereon or the amount of tax or additional tax, as the case may be; and

(c) specify in the appropriate space in that form the date on which that form was duly completed,

B and, where that form appears to have been duly completed the assessment shall, until the contrary is proved, be presumed to have been made on the date so specified.

According to s 93 of the Act, there is formality, ritual and deliberateness in making an assessment. The prescribed form must be used. The date on C which the form is duly completed must be specified in the appropriate space in the form. The date is important as the date on which the assessment must be presumed to have been made. Any other determination as to chargeable income or tax liability made in some other medium, or for some purpose other than for completion of the assessment form, or made before that date, is not, or is not yet, the making of an assessment. Even if the form is D completed, no assessment will have been made until the date is specified. Any work, inquiry or calculation done before that would be not the making of the assessment but an effort made towards the making of the assessment, which is the completion of the form coupled with the dating of it, and the assessment that is made comprises the matters indicated in the form as stated in para (b) of the section.

E

The appellants did not before us argue against the learned judge's resort to s 93 of the Act. There has been no specific mention of it in the memorandum of appeal or the appellants' written outline of submission. In view of s 93 of the Act and of the fact that no question arose before us that assessment forms had been completed for the three years of assessment F in question, we agreed with the learned judge that no assessments had been made in respect of those years and therefore the respondent was under no duty under s 96(1) of the Act to have notices of assessment served on the appellants. We therefore dismissed the appeal.

We ought to add that the respondent's counsel appeared to shrink from reliance on s 93 of the Act. Neither in his oral submission before us nor in G the respondent's outline of submission, nor in the notes of his submission before the judge was there any mention of the section. Whatever may have been the reason for it, it was clear to us that s 93 of the Act provided the answer for the respondent.

Appeal dismissed.

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Reported by Lim Lee Na

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